

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AUDRY A. ACHESON,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,

Defendant.

No. CV-09-304-CI

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 18.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Richard A. Morris represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff Audry A. Acheson (Plaintiff) protectively filed for disability income benefits (DIB) and supplemental security income (SSI) on May 22, 2006. (Tr. 34, 121.) Plaintiff alleged an onset date of June 30, 2003. (Tr. 34.) Benefits were denied initially and on reconsideration. (Tr. 63, 68, 70.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Paul Gaughen on January 21, 2009. (Tr. 32-58.) Plaintiff was represented by counsel and testified at the hearing. (Tr. 43-51.) Vocational expert K. Diane Kramer and medical expert David Rullman, M.D., also testified. (Tr. 37-42, 52-57.) The ALJ denied benefits.

1 (Tr. 13-21.) After reviewing additional evidence submitted by
2 Plaintiff, the Appeals Council denied review. (Tr. 1.) The instant
3 matter is before this court pursuant to 42 U.S.C. § 405(g).

4 **STATEMENT OF FACTS**

5 The facts of the case are set forth in the administrative hearing
6 transcripts and administrative record and will, therefore, only be
7 summarized here.

8 At the time of the hearing, Plaintiff was 41 years old. (Tr.
9 44.) Plaintiff has a high school diploma and a vocational certificate
10 in mechanical drafting and computer aided drafting, plus two
11 additional semesters of college education. (Tr. 44-45.) She last
12 worked in June or July of 2007. (Tr. 46.) Plaintiff has work
13 experience as an educational assistant, a potter in a nursery, an
14 office assistant and weight master for an asphalt company, a
15 strawberry cleaner, cook helper, and home health aide. (Tr. 52-53.)
16 Plaintiff testified she had nighttime seizures as a child, but did not
17 see a doctor about them until she was 19 years old. (Tr. 47.) The
18 first time she had a seizure during the day was when she was working
19 as a cook in 2005. (Tr. 47.) She was fired from that job due to the
20 seizure. (Tr. 47.) Plaintiff testified that in the two years
21 preceding the hearing, she began experiencing daytime seizures at
22 least once a month and more at night, sometimes one or two per month
23 and sometimes more. (Tr. 48.) She can tell when she has had a
24 nighttime seizure because she wakes to find she has bitten her tongue
25 or wet the bed and she is stiff and sore. (Tr. 48.) She experiences
26 warning symptoms before daytime seizures and will be sore for a couple
27 of days afterward. (Tr. 48-49.) She also experiences migraines two
28 to three times per week. (Tr. 49.) Plaintiff testified her muscles

1 hurt from her hips down and in her arms. (Tr. 49.)

2 **STANDARD OF REVIEW**

3 Congress has provided a limited scope of judicial review of a
4 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
5 Commissioner's decision, made through an ALJ, when the determination
6 is not based on legal error and is supported by substantial evidence.
7 See *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v.*
8 *Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
9 determination that a claimant is not disabled will be upheld if the
10 findings of fact are supported by substantial evidence." *Delgado v.*
11 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
12 Substantial evidence is more than a mere scintilla, *Sorenson v.*
13 *Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than
14 a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th
15 Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846
16 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such
17 relevant evidence as a reasonable mind might accept as adequate to
18 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
19 (1971) (citations omitted). "[S]uch inferences and conclusions as the
20 [Commissioner] may reasonably draw from the evidence" will also be
21 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
22 review, the court considers the record as a whole, not just the
23 evidence supporting the decision of the Commissioner. *Weetman v.*
24 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,
25 648 F.2d 525, 526 (9th Cir. 1980)).

26 It is the role of the trier of fact, not this court, to resolve
27 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
28 supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will still
4 be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Sec'y of*
6 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
7 if there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that will support a
9 finding of either disability or nondisability, the finding of the
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987).

12 SEQUENTIAL PROCESS

13 The Social Security Act (the "Act") defines "disability" as the
14 "inability to engage in any substantial gainful activity by reason of
15 any medically determinable physical or mental impairment which can be
16 expected to result in death or which has lasted or can be expected to
17 last for a continuous period of not less than twelve months." 42
18 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
19 a Plaintiff shall be determined to be under a disability only if his
20 impairments are of such severity that Plaintiff is not only unable to
21 do his previous work but cannot, considering Plaintiff's age,
22 education and work experiences, engage in any other substantial
23 gainful work which exists in the national economy. 42 U.S.C. §§
24 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
25 consists of both medical and vocational components. *Edlund v.*
26 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

27 The Commissioner has established a five-step sequential
28 evaluation process for determining whether a claimant is disabled. 20

1 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
2 engaged in substantial gainful activities. If the claimant is engaged
3 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
4 404.1520(a)(4)(I), 416.920(a)(4)(I).

5 If the claimant is not engaged in substantial gainful activities,
6 the decision maker proceeds to step two and determines whether the
7 claimant has a medically severe impairment or combination of
8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If
9 the claimant does not have a severe impairment or combination of
10 impairments, the disability claim is denied.

11 If the impairment is severe, the evaluation proceeds to the third
12 step, which compares the claimant's impairment with a number of listed
13 impairments acknowledged by the Commissioner to be so severe as to
14 preclude substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
16 1. If the impairment meets or equals one of the listed impairments,
17 the claimant is conclusively presumed to be disabled.

18 If the impairment is not one conclusively presumed to be
19 disabling, the evaluation proceeds to the fourth step, which
20 determines whether the impairment prevents the claimant from
21 performing work he or she has performed in the past. If plaintiff is
22 able to perform his or her previous work, the claimant is not
23 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
24 this step, the claimant's residual functional capacity ("RFC")
25 assessment is considered.

26 If the claimant cannot perform this work, the fifth and final
27 step in the process determines whether the claimant is able to perform
28 other work in the national economy in view of his or her residual

1 functional capacity and age, education and past work experience. 20
2 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
3 U.S. 137 (1987).

4 The initial burden of proof rests upon the claimant to establish
5 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
6 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
7 1111, 1113 (9th Cir. 1999). The initial burden is met once the
8 claimant establishes that a physical or mental impairment prevents him
9 from engaging in his or her previous occupation. The burden then
10 shifts, at step five, to the Commissioner to show that (1) the
11 claimant can perform other substantial gainful activity, and (2) a
12 "significant number of jobs exist in the national economy" which the
13 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
14 1984).

15 ALJ'S FINDINGS

16 At step one of the sequential evaluation process, the ALJ found
17 Plaintiff has not engaged in substantial gainful activity since June
18 30, 2003, the alleged onset date. (Tr. 15.) At step two, he found
19 Plaintiff has the following severe impairment: seizures. (Tr. 15.)
20 At step three, the ALJ found Plaintiff does not have an impairment or
21 combination of impairments that meets or medically equals one of the
22 listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 16.)
23 The ALJ then determined:

24 [C]laimant has the residual functional capacity to perform
25 a full range of work at all exertional levels but with the
26 following nonexertional limitations: She should not work
27 around industrial vibrations, unprotected heights, or any
28 dangerous work setting; she should not attempt work
involving operation of a motor vehicle; she exhibits slight
difficulties with concentration and persistence; and she
cannot walk for extended distances or consistently for six
hours in an eight-hour workday.

(Tr. 17.) At step four, the ALJ found Plaintiff is capable of performing past relevant work. (Tr. 20.) Thus, the ALJ concluded Plaintiff has not been under a disability as defined in the Social Security Act from June 30, 2003 through the date of the decision. (Tr. 20.)

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, Plaintiff argues the ALJ: (1) must consider records submitted to the Appeals Council in assessing the medical opinion evidence; (2) made an improper credibility analysis; and (3) failed to properly consider the lay witness statement. (Ct. Rec. 14 at 8-14.) Defendant argues (1) the ALJ properly found that Plaintiff's allegations regarding her limitations were not credible; (2) the ALJ properly considered the lay evidence; and (3) additional records submitted to the Appeals Council do not provide a basis for remand. (Ct. Rec. 19 at 7-16.)

DISCUSSION

1. Evidence Submitted to the Appeals Council

Plaintiff argues evidence submitted to the Appeals Council but not considered by the ALJ requires remand. (Ct. Rec. 14 at 8-11.) It is established in this circuit that any evidence which was submitted to the Appeals Council is part of the record for review.¹ *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (concluding the district court properly considered new evidence submitted to the Appeals

¹There is a split among the circuits on this issue. The Ninth Circuit follows majority rule. See *Mills v. Apfel*, 244 F.3d 1, 4 (1st Cir. 2001) (discussing circuit split).

1 Council because the Appeals Council addressed those materials in
2 denying review); *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir.
3 1993) (noting district court reviewed all materials including evidence
4 not before the ALJ when Appeals Council declined to accept review).
5 Thus, this court properly considers evidence first submitted to the
6 Appeals council in reviewing the ALJ's decision. The question is
7 whether the ALJ's decision is supported by substantial evidence after
8 taking into account the new evidence.

9 The Appeals Council received five pieces of evidence which it
10 made part of the record: (1) records from Dr. Lum dated August 24,
11 2006, to January 2, 2007; (2) records from Dr. Kubitz dated November
12 22, 2006, through May 2, 2008; (3) records from Providence Hospital
13 dated August 24, 2006, through May 2, 2008; records from Dr. Robinson
14 dated June 3, 2008; and records from Wilbur Medical Clinic dated
15 September 28, 2008, through February 24, 2009. (Tr. 4.)² Plaintiff
16

17 ²The Appeals Council's identification of the additional records
18 submitted is confusing when compared to the records themselves and
19 Plaintiff's letters submitting the records. (Tr. 4, 22, 314.) It
20 appears Plaintiff actually submitted records from Longview Clinic
21 dated August 24, 2006, through January 4, 2007, including evidence
22 from Dr. Lum and Dr. Kubitz (Tr. 315-35); records from Elena Robinson,
23 M.D., dated May 16, 2008, through June 3, 2008 (Tr. 336-39); records
24 from Wilbur Medical Clinic dated September 28, 2008, through January
25 2, 2009, (Tr. 340-47); and records from Wilbur Medical Clinic dated
26 February 2, 2009, through February 24, 2009. (Tr. 23-29.) There
27 appears to be no records from Providence Hospital and Plaintiff does
28 not assert a deficiency in the record or reference such records.

1 argues the records indicate that she was not able to engage in full-
2 time employment due to her level of functioning. (Ct. Rec. 14 at 11.)

3 Dr. Lum saw Plaintiff four times between August 24, 2006, and
4 January 2, 2007. (Tr. 280-81, 31-24.) Notes from the first visit on
5 August 24, 2006, indicate Plaintiff had been seizure-free for five or
6 six months, and her last seizure was likely secondary to running out
7 of medication. (Tr. 280.) Dr. Lum ordered blood tests to check
8 Plaintiff's Tegretol level and other baseline levels and made a
9 gynecology referral. (Tr. 280.) At her second visit on September 14,
10 2006, Dr. Lum reviewed the results of blood tests, which included
11 findings that Tegretol was at a therapeutic level and Plaintiff had
12 high cholesterol. (Tr. 281.) Plaintiff denied any fever, chills,
13 nausea, or vomiting and denied seizure activity. (Tr. 281.) On
14 November 10, 2006, Plaintiff visited Dr. Lum for completion of DSHS
15 paperwork. (Tr. 319.) Plaintiff reported a possible seizure episode
16 while sleeping. (Tr. 319.) Dr. Lum noted that Plaintiff reported
17 being unable to get a job secondary to her seizure problems, although
18 she denied any evidence of seizing in the daytime. (Tr. 319.) Dr.
19 Lum referred Plaintiff to a neurologist and stated, "At this point, I
20 have minimal input to see if the [patient] will be permanently
21 disabled or not until she is evaluated by neurology, but I do agree
22 that if the [patient] is having active seizure activity, she should
23 cont[inue] disability until being evaluated by neurology." (Tr. 319.)

24 The last office visit notes from Dr. Lum are dated January 2,
25 2007, and a DSHS Physical Evaluation form was completed concurrently.
26 (Tr. 322-24.) Dr. Lum noted Plaintiff had recently seen Dr. Schostal
27 who had increased Plaintiff's Tegretol dosage. (Tr. 322.) Plaintiff
28 reported side effects of sedation since the increase. (Tr. 322.) Dr.

1 Lum advised Plaintiff to follow up with Dr. Schostal to get the
2 medication adjusted. (Tr. 322.) Plaintiff denied any other concerns.
3 (Tr. 322.) Dr. Lum agreed it would not be a good idea for Plaintiff
4 to return to full time work until the evaluation by the neurologist
5 was complete and medication was further adjusted. (Tr. 322.) Dr. Lum
6 reported that Plaintiff also complained she had been unable to lift
7 heavy objects, but he noted this had not been previously brought up.
8 (Tr. 322.) He also told Plaintiff she would need another appointment
9 to assess her lifting concerns before he could assess any limitations.
10 He noted Plaintiff appeared to be unhappy throughout the discussion
11 and assessment which was relatively unchanged from the previous visit.
12 (Tr. 322.) On the DSHS evaluation form, Dr. Lum noted Plaintiff's
13 ability to concentrate for extended periods of time was limited due to
14 the side effect of some sedation. (Tr. 323.) Dr. Lum indicated that
15 Plaintiff's ability to work is limited to 1-10 hours per week. (Tr.
16 323.) He specifically assessed no limits on lifting and carrying and
17 indicated Plaintiff could do light work. (Tr. 323.) Dr. Lum also
18 indicated that condition would likely limit the ability to work for
19 months rather than assessing it as a permanent condition. (Tr. 324.)

20 Plaintiff argues Dr. Lum's records "clearly indicate that Ms.
21 Acheson was not functioning at a level where she was able to engage in
22 any full-time employment based on Dr. Lum's report." (Ct. Rec. 14 at
23 11.) While Dr. Lum did note that Plaintiff would be limited to light
24 work for 1-10 hours per week, it is not "clear" that Dr. Lum assessed
25 functional limitations constituting a permanent disability. In fact,
26 Dr. Lum declined to characterize Plaintiff's reported symptoms as a
27 permanent disability, instead indicating that it was expected to last
28 for only months. (Tr. 324.) The side effect of sedation from an

1 increase in Tegretol was a new development and was not mentioned
2 anywhere else in the record. Notably, side effects from Tegretol such
3 as impaired concentration or sedation were not mentioned by Dr. Bell,
4 the neurologist who saw Plaintiff shortly thereafter in May 2007,
5 despite Dr. Lum's urging that Plaintiff consult with a neurologist
6 about her complaints. (Tr. 297.) Dr. Lum's records do make clear
7 that he wanted to defer an opinion as to permanent disability without
8 further input from a neurologist. (Tr. 319, 323-24.) Furthermore,
9 Dr. Lum's records support many of the ALJ's findings, including the
10 negative credibility finding. Dr. Lum observed that Plaintiff
11 reported no daytime seizures for six months, yet stated she is unable
12 to work due to seizures, similar to the statement by psychiatrist Dr.
13 Michel noted by the ALJ in assessing Plaintiff's credibility. (Tr.
14 250, 319.) Plaintiff also told Dr. Lum her last seizure was due to
15 running out of medication. (Tr. 315.) This is consistent with the
16 ALJ's observations that no physician opined Plaintiff was disabled,
17 and that her seizure condition is relatively controllable and does not
18 detrimentally affect her general abilities. (Tr. 19.) Nothing in Dr.
19 Lum's records undermines the ALJ's findings or conclusions. As a
20 result, even considering Dr. Lum's records, the ALJ's decision is
21 supported by substantial evidence.

22 Plaintiff also points to records from Dr. Robinson as evidence
23 undermining the ALJ's opinion. (Ct. Rec. 14 at 11.) Plaintiff saw
24 Dr. Robinson one time on May 16, 2008. (Tr. 336-38.) Dr. Robinson
25 noted plaintiff reported suffering from moderate to severe headaches
26 all her life. (Tr. 336.) Plaintiff had been taking daily anti-
27 inflammatory medications as needed. (Tr. 336.) Dr. Robinson noted no
28 seizures since an increase in anti-seizure medication. (Tr. 336.) Dr.

1 Robinson mentioned migrainous features to Plaintiff's headaches,
2 advised against medication overuse for control of headaches, and
3 recommended Lyrica and naturopathic supplements to help improve daily
4 headaches. (Tr. 337-38.) On June 3, 2008, Dr. Robinson wrote a note
5 "To Whom It May Concern" and stated that Plaintiff "despite treatment
6 with medications, Ms. Acheson still experiences breakthrough
7 seizures." (Tr. 339.) Dr. Robinson also wrote that when she has a
8 seizure, she is very likely to miss her college classes "due to the
9 disability of the seizure." (Tr. 339.)

10 Nothing in Dr. Robinson's office visit notes is suggestive of
11 additional functional limitations or disability due to seizure
12 disorder. Plaintiff's seizures are superficially addressed by Dr.
13 Robinson in noting history of seizure and no recent occurrences. (Tr.
14 336.) Much of the note from Dr. Robinson is focused on headache
15 control. (Tr. 336-38.) The letter "To Whom It May Concern" mentions
16 breakthrough seizures which are so disabling as to prevent Plaintiff
17 from attending college classes. (Tr. 339.) There is no evidence
18 supporting this in Dr. Robinson's office visit note, and the ALJ's
19 discussion of the medical evidence is not affected or undermined by
20 Dr. Robinson's unsubstantiated and unspecific note written to excuse
21 Plaintiff from college classes.

22 Plaintiff does not argue any other records submitted to the
23 Appeals Council but not considered by the ALJ justify remand. The
24 records from Dr. Kubitz (Tr. 317, 325) and Wilbur Medical Clinic (Tr.
25 23-29, 340-48) do not undermine the ALJ's findings and conclusions.
26 The court concludes that the ALJ's decision is supported by
27 substantial evidence after taking into account all the records
28 submitted to the Appeals Council. As a result, remand is not

1 justified on the basis of the additional records.

2 Lastly, it is noted Plaintiff also appears to argue that the ALJ
3 improperly relied on the testimony of the medical expert, Dr. Rullman,
4 who testified at the hearing. (Ct. Rec. 14 at 8-9.) Plaintiff's
5 argument is unclear, since the ALJ noted that accepted medical source
6 opinions were generally consistent and gave significant weight to
7 those opinions. (Tr. 19; Ct. Rec. 14 at 9.) The ALJ also gave great
8 weight to the expert medical testimony of Dr. Rullman. (Tr. 19.) The
9 opinion of a non-examining physician may be accepted as substantial
10 evidence if it is supported by other evidence in the record and is
11 consistent with it. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-
12 31. Plaintiff does not explain how the ALJ erred in relying on Dr.
13 Rullman's opinion, or specifically address any evidence cited by the
14 ALJ as consistent with and supporting Dr. Rullman's opinion. (Tr. 15-
15 20.) Plaintiff's argument seems to suggest that Dr. Rullman's opinion
16 contradicts evidence from Dr. Lum and Dr. Robinson, but as discussed
17 *supra*, the evidence submitted to the Appeals Council and not reviewed
18 by the ALJ does not undermine the ALJ's reliance on Dr. Rullman's
19 testimony or the ALJ's other conclusions and findings.

20 **2. Credibility**

21 Plaintiff argues the ALJ did not adequately consider her
22 testimony. (Ct. Rec. 14 at 12-13.) In social security proceedings, the
23 claimant must prove the existence of a physical or mental impairment
24 by providing medical evidence consisting of signs, symptoms, and
25 laboratory findings; the claimant's own statement of symptoms alone
26 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
27 must be evaluated on the basis of a medically determinable impairment
28 which can be shown to be the cause of the symptoms. 20 C.F.R. §

1 416.929.

2 Once medical evidence of an underlying impairment has been shown,
3 medical findings are not required to support the alleged severity of
4 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
5 If there is evidence of a medically determinable impairment likely to
6 cause an alleged symptom and there is no evidence of malingering, the
7 ALJ must provide specific and cogent reasons for rejecting a
8 claimant's subjective complaints. *Id.* at 346. The ALJ may not
9 discredit pain testimony merely because a claimant's reported degree
10 of pain is unsupported by objective medical findings. *Fair v. Bowen*,
11 885 F.2d 597, 601 (9th Cir. 1989). The following factors may also be
12 considered: (1) the claimant's reputation for truthfulness; (2)
13 inconsistencies in the claimant's testimony or between his testimony
14 and his conduct; (3) claimant's daily living activities; (4)
15 claimant's work record; and (5) testimony from physicians or third
16 parties concerning the nature, severity, and effect of claimant's
17 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

18 If the ALJ finds that the claimant's testimony as to the severity
19 of her pain and impairments is unreliable, the ALJ must make a
20 credibility determination with findings sufficiently specific to
21 permit the court to conclude that the ALJ did not arbitrarily
22 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 599, 601-02
23 (9th Cir. 1999). In the absence of affirmative evidence of
24 malingering, the ALJ's reasons must be "clear and convincing."
25 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007);
26 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*, 169
27 F.3d at 599. The ALJ "must specifically identify the testimony she or
28 he finds not to be credible and must explain what evidence undermines

1 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
2 2001)(citation omitted).

3 The ALJ found Plaintiff's medically determinable impairments
4 could reasonably be expected to cause the alleged symptoms, but that
5 the Plaintiff's statements concerning the intensity, persistence and
6 limiting effects of the symptoms are not credible to the extent they
7 are inconsistent with the RFC assessment. (Tr. 18.) Plaintiff argues
8 that the ALJ "failed to set forth reasons why Ms. Acheson's testimony
9 regarding the frequencies of her seizures was not credible and what
10 facts in the record led to that conclusion." (Ct. Rec. 14 at 12-13.)
11 However, the ALJ listed a number of factors undermining Plaintiff's
12 credibility and cited numerous points in the record supporting his
13 reasoning.

14 First, the ALJ concluded the objective medical evidence does not
15 support the level of limitations claimed. (Tr. 18.) While subjective
16 pain testimony may not be rejected solely because it is not
17 corroborated by objective medical findings, the medical evidence is a
18 relevant factor in determining the severity of a claimant's pain and
19 its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
20 Cir. 2001); 20 C.F.R. § 416.929(c)(2). The ALJ observed that Dr.
21 Michels, a psychiatrist, summarized the conclusions that can be drawn
22 from the medical evidence by stating, "Although she has not had any
23 seizures in the daytime since [May 2005], she explains that the reason
24 she is not working now is solely because of the seizures." (Tr. 250.)
25 Notably, Plaintiff attributed the May 2005 daytime seizure to low
26 Tegretol levels. (Tr. 250.).

27 Second, the ALJ pointed out that no medical source has opined
28 that Plaintiff cannot work. (Tr. 18.) The ALJ may consider the fact

1 that no treating or examining physician has found a claimant disabled.
2 See *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993). The ALJ
3 also observed that the most significant limitation noted by any
4 physician is that Plaintiff should not drive until she is seizure-free
5 for six months. (Tr. 18, 214, 253.) These factors are inconsistent
6 with Plaintiff's claim that she cannot work and, therefore, undermine
7 her credibility.

8 Third, the ALJ noted that daytime seizures experienced by
9 Plaintiff appear to be due to a lack of medication. (Tr. 18.)
10 Credibility is undermined by unexplained, or inadequately explained,
11 failure to seek treatment or follow a prescribed course of treatment.
12 While there are any number of good reasons for not doing so, see,
13 e.g., 20 C.F.R. § 404.1530(c) (1988); *Gallant*, 753 F.2d at 1455, a
14 claimant's failure to assert one, or a finding by the ALJ that the
15 proffered reason is not believable, can cast doubt on the sincerity of
16 the claimant's pain testimony. *Fair v. Bowen* 885 F.2d 597, 603 (9th
17 Cir. 1989). In March 2005, Plaintiff visited the emergency room after
18 a single isolated seizure and informed an emergency room physician
19 that she had recently missed three days of her anti-seizure
20 medication.³ (Tr. 219.) In May 2005, Plaintiff's Tegretol level was
21
22

23 ³The ALJ erroneously indicated Plaintiff saw Dr. Schneider in the
24 emergency room in March 2008 rather than March 2005. (Tr. 18, 219.)
25 This is a harmless error because it is inconsequential to the ultimate
26 outcome. See *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir.
27 2006); *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th
28 Cir. 2006).

1 low after she had her first daytime seizure at work.⁴ (Tr. 214.)
2 These facts were properly considered by the evidence and lead to a
3 reasonable conclusion that at least some of Plaintiff's seizures are
4 caused by medication noncompliance.

5 Next, the ALJ noted other inconsistencies in Plaintiff's reports
6 of symptoms. (Tr. 18.) In making a credibility evaluation, the ALJ
7 may rely on ordinary techniques of credibility evaluation. *Smolen v.*
8 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ noted that
9 although Plaintiff reported in December 2006 that she had experienced
10 headaches for years, she denied having headaches in May 2005 and did
11 not mention headaches to Dr. Michels in July 2006. (Tr. 213, 249-53,
12 290.) Similarly, Plaintiff reported to Dr. Robinson in May 2008 that
13 she had moderate to severe headaches "for many years" and "all my
14 life" (Tr. 336), but denied any complaints other than seizures to Dr.
15 Lum in January 2007.⁵

16 The ALJ observed that Plaintiff also testified she experiences
17 body pain in her arms and legs, yet no medical record indicates she
18 complained of this pain to medical sources. (Tr. 19, 49-50.) It is
19 noted that in a February 2009 record not available to the ALJ,
20 Plaintiff complained to Dr. St. Clair that she had muscle pain and
21 weakness in her arms and legs in a persistent pattern for over two
22 years. (Tr. 23.) Dr. St. Clair also noted that Plaintiff reported
23 muscle weakness as occurring between the ages of 20 and 40. (Tr.

24
25 ⁴Plaintiff testified the May 2005 seizure was the first daytime
26 seizure she had ever had. (Tr. 47.)

27 ⁵The records of Dr. Lum and Dr. Robinson were not available to the
28 ALJ.

23.) While this record was not available to the ALJ, it does not undermine the ALJ's credibility finding. To the contrary, it is similar to the headache evidence because it reflects Plaintiff's complaints that she has had symptoms for years, but those symptoms are not substantiated by the record.

The ALJ noted that Plaintiff was able to engage in substantial gainful activity from 1997 to 2003 despite her seizure condition. (Tr. 126.) Plaintiff was reluctant to reveal to Dr. Michel that she had not sought treatment or evaluation of her seizure condition by a neurologist for more than 20 years, which the ALJ concluded detracted from her credibility. (Tr. 249.)

The ALJ also considered whether Plaintiff's condition recently worsened. (Tr. 19.) He observed that in December 2006, Plaintiff reported that ibuprofen gave relief from headaches. (Tr. 290.) In April 2007, Plaintiff reported no further seizures since increasing Tegretol. (Tr. 288.) Dr. Bell, a neurologist, opined in July 2007 that some of Plaintiff's recurring seizures seemed to be caused by medication noncompliance. (Tr. 295.) He noted that Plaintiff complained Tegretol makes her very nauseated and she would not take the daytime dose when she had to go somewhere. (Tr. 295.) Under those conditions, Dr. Bell indicated she will have recurring seizures.⁶ (Tr. 295.) The ALJ concluded that overall, the evidence indicates that Plaintiff's seizures are controllable and do not detrimentally affect her general abilities. (Tr. 19.) The ALJ noted evidence that Plaintiff enjoys life, has no trouble falling or staying asleep, and

⁶There is no other mention of nausea due to Tegretol in the record.

1 denied symptoms other than her seizures. (Tr. 250.) Plaintiff has no
2 psychological limitations. (Tr. 253.) The reviewing physician and
3 medical expert both opined that Plaintiff has no exertional
4 limitations. (Tr. 41-42, 287.) The ALJ properly considered all of
5 this evidence and reasonably interpreted it.

6 The ALJ cited many factors justifying the negative credibility
7 finding and those factors constitute clear and convincing reasons
8 supported by substantial evidence. Plaintiff's argument fails to
9 address the specific reasons mentioned by the ALJ as the basis for the
10 credibility finding. The ALJ's interpretation of the evidence was
11 reasonable and his conclusions are supported by the evidence. As a
12 result, the ALJ did not err.

13 **3. Lay Witness**

14 Plaintiff argues the ALJ failed to properly consider the
15 statement of James Dawson. (Ct. Rec. 14 at 13-14.) Mr. Dawson,
16 Plaintiff's former live-in companion, completed a DSHS Seizures
17 Questionnaire form in June 2006. (Tr. 168-69.) He wrote that he had
18 witnessed "hundreds" of Plaintiff's seizures. He indicated that
19 Plaintiff has them both during the day and at night and described some
20 symptoms and effects. (Tr. 168-69.)

21 An ALJ must consider the testimony of lay witnesses in
22 determining whether a claimant is disabled. *Stout v. Commissioner of*
23 *Social Security*, 454 F.3d 1050, 1053 (9th Cir. 2006). Lay witness
24 testimony regarding a claimant's symptoms or how an impairment affects
25 ability to work is competent evidence and must be considered by the
26 ALJ. If lay testimony is rejected, the ALJ "must give reasons that
27 are germane to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467
28 (9th Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.

1 1993)).

2 The ALJ considered Mr. Dawson's statement, noting that Mr. Dawson
3 reported Plaintiff's seizures occur "mostly when sleeping." (Tr. 17,
4 168.) The ALJ gave less weight to Mr. Dawson's statement because it
5 is not consistent with the objective medical evidence. (Tr. 20.) An
6 ALJ may discount lay testimony if it conflicts with medical evidence.
7 *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (citing *Vincent v.*
8 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)). As outlined in the ALJ's
9 credibility findings, the medical evidence shows that despite
10 Plaintiff's seizure disorder, her activities and abilities are not
11 particularly impaired. Furthermore, the evidence suggests that
12 Plaintiff's daytime seizures can be controlled by medication.

13 Plaintiff argues Mr. Dawson's statement that Plaintiff
14 experiences side effects from Tegretol of weight gain and being tired
15 all day is supported by evidence from Dr. Lum, which was not before
16 the ALJ. (Ct. Rec. 14 at 14.) Plaintiff did not complain of
17 tiredness or sedation in her first two visits to Dr. Lum. (Tr. 280-
18 81.) In January 2007, during a visit to complete a DSHS Physical
19 Evaluation form, Dr. Lum noted Plaintiff reported having some side
20 effects of sedation after Dr. Schostal, a neurologist, increased her
21 dosage of Tegretol. (Tr. 322.) Dr. Lum recommended that Plaintiff
22 return to Dr. Schostal for medication management. (Tr. 322.) Dr.
23 Lum's records do not support the statement that Plaintiff is tired all
24 day. The sedation is based on Plaintiff's self-report, which was
25 properly determined by the ALJ to be unreliable. Additionally, Dr.
26 Lum's note reflects that the sedation effect was a recent side effect
27 due to change in medication, and does not support the level of
28 tiredness suggested by Mr. Dawson's statement. As a result, even

1 considering the records from Dr. Lum, the ALJ's rejection of Mr.
2 Dawson's statement is supported by a reason germane to the witness and
3 substantial evidence.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, this court
6 concludes the ALJ's decision is supported by substantial evidence and
7 is not based on error. Accordingly,

8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
12 **DENIED.**

13 The District Court Executive is directed to file this Order and
14 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
15 be entered for Defendant and the file shall be **CLOSED.**

16 DATED March 11, 2011.

17
18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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